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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91205331
Party	Defendant Kerry Earnhardt, Inc.
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Date	12/09/2014
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Teresa H. Earnhardt,	§	Consolidated Opposition Nos.
	§	91205331 (parent) and 91205338
Opposer,	§	
	§	In the matter of:
vs.	§	
	§	Application Serial No. 85/383,910
Kerry Earnhardt, Inc.	§	Mark: EARNHARDT COLLECTION
	§	(Intl. Class 20)
Applicant,	§	
	§	Application Serial No. 85/391,456
	§	Mark: EARNHARDT COLLECTION
		(Intl. Class 37)

APPLICANT'S NOTICE OF FILING OF THE TRANSCRIPT
OF THE TESTIMONY PERIOD DEPOSITION
OF KELLEY EARNHARDT MILLER

PLEASE TAKE NOTICE that Kerry Earnhardt, Inc. ("Applicant") hereby files the transcript of the October 20, 2014, testimony period deposition of Kelley Earnhardt Miller.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing "Applicant's Notice of Filing of the Transcript of the Testimony Period Deposition of Kelley Earnhardt Miller" was duly served on Opposer by depositing copies of same in the United States mail, first-class postage prepaid, on the 5th day of December, 2014 addressed to Opposer's attorneys of record as follows:

Larry C. Jones
Bruce J. Rose
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101 South Tryon Street, Suite 4000
Charlotte, North Carolina 28280-4000



Cary Baxter Davis

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

- - - - -X Consolidated Opposition No.

Teresa H. Earnhardt, : 91205331 (parent) and

Opposer, : 91205338

: In the Matter of:

v. : Application Serial

: No. 85/383,910

Kerry Earnhardt, : Mark: EARNHARDT COLLECTION

Inc., : (Intl. Class 20)

Applicant. : Application Serial

- - - - -X No. 85/391,456

Mark: EARNHARDT COLLECTION

(Intl. Class 37)

Deposition of KELLEY EARNHARDT MILLER

(Taken by Applicant)

Charlotte, North Carolina

October 20, 2014

Reported by: Andrea Nobrega

Court Reporter

Notary Public

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20 Also Present: RENE EARNHARDT

21

22 Deposition of KELLEY EARNHARDT MILLER,
23 taken by the Applicant, at 100 North Tryon
24 Street, Charlotte, North Carolina, on the
25 20th day of October 2014 at 10:35 a.m.,
before Andrea L. Nobrega, Notary Public
and Court reporter.

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1 P R O C E E D I N G S

2 Whereupon, KELLEY EARNHARDT MILLER, having
3 been first duly sworn, was examined and
4 testified as follows:

5 DIRECT EXAMINATION

6 BY MR. SANDERS:

7 Q. Good morning, Ms. Miller.

8 A. Good morning.

9 Q. Would you state your full name for
10 the record?

11 A. Kelley Earnhardt Miller.

12 Q. Ms. Miller, please describe how
13 you fit in the Earnhardt family tree?

14 A. I am the daughter of Dale
15 Earnhardt and sister to Kerry Earnhardt,
16 Dale Earnhardt, Jr. and Taylor Earnhardt.

17 Q. What's your relation to Rene
18 Earnhardt?

19 A. Sister-in-law.

20 Q. What's your connection to Teresa
21 Earnhardt?

22 A. Stepmother.

23 Q. Where do you live, Ms. Miller?

24 A. In Cleveland, North Carolina.

25 Q. What's your educational

1 background?

2 A. I attended or graduated from UNC
3 Charlotte in 1995 with a business
4 administration degree.

5 Q. Where do you work now?

6 A. I work at JR Motorsports.

7 Q. How long have you been at JR
8 Motorsports?

9 A. 13 years, since 2001.

10 Q. What's the business of JR
11 Motorsports?

12 A. We are in the business of managing
13 the Dale Earnhardt, Jr. brand, licensing,
14 marketing, all his accounting.

15 I do investments advising for Dale
16 and then we operate two -- three
17 Nationwide teams and two Late Model Stock
18 teams in the NASCAR series.

19 Q. What is your role in JR
20 Motorsports?

21 A. I am the general manager, so I
22 oversee all 120 employees.

23 Q. What series does Dale, Jr. race
24 in?

25 A. The NASCAR Sprint Cup Series.

1 Q. How has he done this year in that
2 series?

3 A. Well. Three wins under his belt
4 and made The Chase.

5 Q. Where were his wins?

6 A. The Daytona 500 in February and
7 the two Pocono races.

8 Q. How important is the Daytona 500
9 in the Sprint Cup Series?

10 A. It's pretty much the Superbowl of
11 the series. So it's pretty much the one
12 that all the drivers want to win.

13 Q. Does Dale, Jr. have a lot of fans
14 in racing?

15 A. Yes.

16 Q. Does NASCAR have a most popular
17 driver award?

18 A. Yes, and Dale won that award 11
19 times in a row.

20 Q. Ms. Miller, are you aware that the
21 Charlotte Observer does an annual ranking
22 of the most influential people in NASCAR?

23 A. Yes.

24 Q. And where does Dale, Jr. rank in
25 that annually?

1 A. He is typically in the top five,
2 top ten at best. I think in the last
3 couple years he has been around sixth or
4 so.

5 Q. Have you ever been ranked in the
6 top ten?

7 A. Yes, as a matter of fact, I have.

8 Q. When, if you can remember?

9 A. I think that was 2007, if I'm not
10 mistaken, where Dale and I were both
11 ranked, I think in maybe second.

12 Q. Alright. You mentioned that you
13 all have teams racing in the Nationwide
14 Series. What is the Nationwide Series?

15 A. Is the second tier series to the
16 Cup Series.

17 Q. And how are the JR Motorsports'
18 Nationwide teams doing?

19 A. We are currently one, two in
20 the championship standings with Chase
21 Elliott and Regan Smith.

22 Q. How many wins, Nationwide wins do
23 your teams have this year?

24 A. We have ten wins.

25 Q. Ms. Miller, how long have you been

1 going to NASCAR races?

2 A. Pretty much since I was a baby. I
3 think I was almost born at the racetrack,
4 so my mom tells the story.

5 Q. So you literally were almost
6 delivered at a NASCAR race?

7 A. Almost.

8 Q. Is it fair to say you have been
9 going to NASCAR races from an early age?

10 A. Yes, I have. I attended as a kid
11 with Teresa and my dad and continue to go
12 now in my role.

13 Q. Have you ever heard the name
14 Earnhardt yelled at NASCAR races?

15 A. Uh-huh.

16 Q. How about, have you ever heard
17 fans yell simply Earnhardt by itself
18 referring to your brother Dale, Jr. at a
19 NASCAR race?

20 A. Yes.

21 Q. How often does that happen or how
22 frequently does that happen?

23 A. Well, I hear it often just if you
24 walk through the pit with him or something
25 like that, or if you are at a autograph

1 session that's typically used.

2 Q. Were you ever a driver?

3 A. I was. I drove in '94, '95 and
4 '96.

5 Q. What?

6 A. In the NASCAR Late Model Stock
7 Series.

8 Q. Did fans ever yell Earnhardt at
9 you?

10 A. Uh-huh.

11 Q. How about your brother, Kerry, has
12 he been a NASCAR driver?

13 A. Yes.

14 Q. What series did he drive in?

15 A. He has raced in the Goody's Dash
16 Series, the Truck Series, the Bush Series
17 at the time, Arca, and he has even raced
18 in the Cup Series as well.

19 Q. Did you ever hear fans yell
20 Earnhardt at him when he was driving?

21 A. I have heard fans yell Earnhardt
22 at him mainly in my capacity at like
23 autograph sessions a lot of times.

24 Q. Has your brother, Dale, Jr.'s
25 name, been trademarked?

1 A. Yes.

2 Q. And what is the trademark?

3 A. Dale Earnhardt, Jr.

4 Q. Ms. Miller, do you know what Dale
5 Earnhardt, Inc. is?

6 A. Yes.

7 Q. And if I call it DEI, will you
8 understand what I'm saying?

9 A. Yes, uh-huh, yep.

10 Q. Did Dale, Jr. once drive for DEI?

11 A. Yes.

12 Q. Was Dale Earnhardt, Jr.'s name
13 trademarked while he was the DEI?

14 A. Yes.

15 Q. Did DEI participate in that
16 trademark registration?

17 A. Yes, they did.

18 Q. Did Teresa Earnhardt have any
19 objections to that registration?

20 A. No.

21 Q. Does your brother, Dale, own his
22 trademark now?

23 A. Yes.

24 Q. When did he acquire that?

25 A. Teresa assigned it to him in I

1 think June of 2006.

2 Q. What goods or services does the
3 Dale Earnhardt, Jr. trademark cover?

4 A. Pretty much everything that you
5 can imagine, apparel, head wear, marketing
6 services, hard goods, die cast, jewelry,
7 furniture, pet products, sunglasses.
8 That's what I can think of.

9 Q. What type of furniture?

10 A. We license like bar stools and pub
11 tables, some recliners. We have done pool
12 tables way in the past. Those are the
13 current items.

14 Q. Any traditional type furniture?

15 A. No. Outside the recliner, no.

16 Q. Has the Dale Earnhardt, Jr.
17 trademark ever been used in connection
18 with custom homes?

19 A. No.

20 Q. Does JR Motorsports sell or
21 license goods under the Dale Earnhardt,
22 Jr. trademark?

23 A. Yes.

24 Q. What types of goods?

25 A. Yeah, the same stuff, you know,

1 apparel, jewelry, pet products, head wear,
2 die-cast, stickers, license plates,
3 pencils, you name it.

4 Q. And how and where are those goods
5 sold?

6 A. They are primarily sold track side
7 at the NASCAR events, on the Internet,
8 NASCAR.com, at our retail store and in
9 mass market at Walmart.

10 Q. Ms. Miller, are you familiar with
11 the goods that DEI licenses for sale under
12 the Dale Earnhardt mark?

13 A. Yes.

14 Q. What types of goods?

15 A. Very similar in nature to the same
16 products as Dale, Jr.

17 Q. How and where are they sold?

18 A. I think through the same channels.
19 I'm not sure if they are sold at mass
20 retail, but the same, Internet, mom and
21 pop top stores, and track side.

22 Q. Who are the customers for Dale
23 Earnhardt, Sr. merchandise like you
24 described?

25 MR. ROSE: Objection to form.

1 THE WITNESS: NASCAR enthusiasts.

2 BY MR. SANDERS:

3 Q. And who are the customers for Dale
4 Earnhardt, Jr. merchandise like you have
5 described?

6 A. NASCAR fans and enthusiasts.

7 Q. Are you familiar with the
8 designation Earnhardt Collection?

9 A. I am.

10 Q. And what is that designation used
11 with?

12 A. It's used as a distinctive brand
13 to describe the design and build of custom
14 homes.

15 Q. You used the word distinctive.
16 What makes them distinctive?

17 A. The brand is symbolic of really
18 Kerry and Rene's love of the outdoors and
19 the homes are designed as such so that
20 they have a lot of lighting and outdoor
21 living type spaces within the homes.

22 Q. Is your brother, Kerry, an outdoor
23 person?

24 A. Oh, yes, definitely, a hunter, a
25 fisherman, rodeo, you name it. They are

1 outdoor and country.

2 Q. And you say they, so I guess you
3 include Rene in that, also?

4 A. Yeah.

5 Q. Has anybody come to JR Motorsports
6 and asked if the Earnhardt Collection was
7 associated with Dale Earnhardt, Jr.?

8 A. No, not that I'm aware of. I have
9 never had a receptionist have to ask me
10 that question, so I'm not aware that it's
11 been asked.

12 Q. Has anybody ever contacted JR
13 Motorsports about the possibility of
14 buying a custom home?

15 A. No.

16 Q. In your role as the general
17 manager at JR Motorsports, do you care
18 about protecting Dale, Jr.'s trademark?

19 A. Yes.

20 Q. Do you have any business concern
21 that Kerry Earnhardt, Inc.'s use of the
22 Earnhardt Collection does any harm to
23 Dale, Jr.'s trademark?

24 MR. ROSE: Objection to form.

25 THE WITNESS: I don't have any

1 concern with that because it's not a
2 business we are in or it's not symbolic of
3 Dale's brand or what he is about.

4 BY MR. SANDERS:

5 Q. Ms. Miller, do you consider the
6 Earnhardt family a racing family?

7 A. Yes.

8 Q. Why is that?

9 A. Well, we have been racing since my
10 papaw Ralph was on the dirt tracks back in
11 the '50s.

12 Since then pretty much almost
13 every member of our family races, my dad,
14 my brothers, myself, my aunt Kathy, both
15 of my daughters race today, Bobby and
16 Jeffrey, Kerry and Rene's sons.

17 Q. Have various members of your
18 family licensed their name in racing to
19 promote their careers?

20 A. Yes.

21 Q. What year did your father die?

22 A. 2001.

23 Q. In your opinion, when your father
24 was alive, was he or your brother, Dale,
25 Jr. better known to the consuming public?

1 A. I would say my dad.

2 Q. In your opinion now, which of them
3 is better known to the consuming public?

4 MR. ROSE: Object to form.

5 THE WITNESS: I would say Dale,
6 Jr.

7 BY MR. SANDERS:

8 Q. What's your basis for saying that?

9 A. Well, from an active standpoint, I
10 mean he is the one out there actively
11 marketing and has sponsorship
12 relationships and personal service
13 endorsements, the number one seller of
14 NASCAR merchandise today, most popular
15 driver.

16 Q. Do you know where Dale Earnhardt,
17 Sr. merchandise is in the rankings for
18 sales?

19 MR. ROSE: Object to the form.

20 THE WITNESS: I don't know the
21 specific number, but I think somewhere in
22 between 10th or so, 10th to 12th.

23 BY MR. SANDERS:

24 Q. Does Dale Earnhardt, Inc. have any
25 race teams competing now?

1 A. No.

2 Q. Let me ask about some family
3 relationships. Your brothers, Kerry and
4 Dale, do they support you in what you're
5 doing?

6 A. Oh, yeah, they support me, you
7 know, personally in relationships and then
8 professionally, also.

9 Q. What about your father, Dale, Sr.,
10 was he supportive of you personally and in
11 business?

12 MR. ROSE: Object to form.

13 THE WITNESS: Yes, he was. I
14 worked in many of his businesses.

15 BY MR. SANDERS:

16 Q. Did he ever try to keep you from
17 using the Earnhardt name?

18 A. No.

19 Q. Did he ever try to keep, to your
20 knowledge, keep your brothers from using
21 the family name?

22 A. No.

23 Q. What was your father's role at
24 Dale Earnhardt, Inc.?

25 A. He was the founder and principal.

1 Q. Was he involved in marketing and
2 licensing goods under his name?

3 A. Very much so.

4 Q. Was Dale, Jr. racing for DEI while
5 your father was alive?

6 A. Yes.

7 Q. And what about Kerry?

8 A. Yes, he was.

9 Q. Did your father, Dale, Sr., help
10 promote their careers while they were at
11 DEI?

12 A. Say that again.

13 Q. Did he help promote their racing
14 careers while they were at DEI?

15 A. Yes.

16 Q. Did he appear with them at events?

17 A. Yes, he did.

18 Q. Was he in photographs with them?

19 A. Yeah.

20 Q. To your knowledge, did DEI
21 participate in promoting Dale, Jr.'s and
22 Kerry's careers?

23 A. Yes.

24 MR. SANDERS: Thank you. I don't
25 have any other questions right now.

1 MR. ROSE: I just have a few
2 questions for you if that's okay.

3 CROSS-EXAMINATION

4 BY MR. ROSE:

5 Q. Growing up and before your father
6 passed away, you had heard him at
7 racetracks referred to as Earnhardt,
8 right?

9 A. Uh-huh.

10 Q. Just the single name Earnhardt?

11 A. Uh-huh.

12 Q. And you knew that people were
13 talking about Dale, right?

14 A. Uh-huh.

15 Q. I need a yes or a no so she could
16 write down.

17 A. Yes, sorry.

18 Q. So you heard fans yell Earnhardt
19 in referring to your father, right?

20 A. Yes.

21 Q. And you had seen newspaper
22 articles or heard journalists on TV refer
23 to Earnhardt referring to your father,
24 right?

25 A. Yes.

1 Q. And he sometimes referred to
2 himself at Earnhardt, right?

3 A. Yes.

4 Q. He would answer the phone and say
5 Earnhardt, right?

6 A. Yes.

7 Q. He didn't refer to himself as
8 Earnhardt, Sr., did he?

9 A. No. That came after his death.

10 Q. And so you growing up never
11 referred to him as Dale, Sr. or Dale
12 Earnhardt, Sr., right?

13 A. No.

14 Q. And you refer to your brother,
15 Dale, Jr., as Earnhardt as well, right?

16 A. Do I refer to him that way?

17 Q. Yes, do you ever call him
18 Earnhardt?

19 A. Not very often.

20 Q. But you have heard other people
21 refer to him as just Earnhardt?

22 A. Yeah, fans definitely call him
23 just Earnhardt.

24 Q. Are you familiar with the terms of
25 the assignment agreement between DEI, JR

1 Motorsports and Dale, Jr.?

2 A. Pretty familiar.

3 Q. And you are a signatory to that,
4 aren't you?

5 A. Yes.

6 Q. And your brother is also in
7 addition to sometimes being referred to as
8 Earnhardt, he is also referred to as Dale,
9 Jr.?

10 A. Yes.

11 Q. Or sometimes just Junior, right?

12 A. Yes.

13 Q. And sometimes he is referred to as
14 Earnhardt, Jr., correct?

15 A. Yes.

16 Q. What is the relationship between
17 JR Motorsports and Kerry Earnhardt, Inc.?

18 A. There is no relationship.

19 Q. Does JR Motorsports -- is JR
20 Motorsports playing any role in -- well,
21 we refer to Kerry Earnhardt as KEI. Will
22 you understand that KEI means Kerry
23 Earnhardt, Inc.?

24 A. Yes.

25 Q. Is JR Motorsports playing any role

1 in KEI's efforts to register the mark
2 Earnhardt Collection?

3 A. No, we have not.

4 Q. Does JR Motorsports play any role
5 in this opposition proceeding other than
6 you being here as a witness today?

7 A. No.

8 Q. Has JR Motorsports paid any of
9 KEI's legal fees associated with this
10 proceeding?

11 A. No.

12 Q. Have you?

13 A. No.

14 Q. Has Dale, Jr.?

15 A. No.

16 Q. So you have heard the term
17 Earnhardt being used to refer to your
18 father, right?

19 A. Yes.

20 Q. And to your brother?

21 A. Yes.

22 Q. Both of your brothers, right?

23 A. Yes.

24 Q. Have you ever heard the term
25 Earnhardt being used to refer to anything

1 other than a person whose surname is
2 Earnhardt?

3 A. I know of other businesses that
4 are Earnhardt, Earnhardt Grading,
5 different things like that.

6 Q. But in relation to somebody named
7 Earnhardt, though, right?

8 A. I would assume that people that
9 own the business are probably named
10 Earnhardt, but I don't have knowledge of
11 that.

12 Q. I want to now focus on the use of
13 the word collection. We have had
14 testimony in this case that in the housing
15 industry the term collection is often used
16 to identify a group or a portfolio of
17 homes or home designs.

18 Do you have any understanding in
19 the home business that the term collection
20 is used other than that?

21 MR. SANDERS: Objection to the
22 form.

23 THE WITNESS: Yeah, I only know of
24 the Earnhardt Collection, which is the
25 matter at hand.

1 BY MR. ROSE:

2 Q. Have you ever heard of the term
3 collection being used before -- just in
4 your personal life, the word collection
5 being used to refer to a collection or a
6 group of home designs?

7 A. Not that I'm aware.

8 Q. Have you heard the word collection
9 being used in connection with furniture
10 before?

11 A. Not that I'm aware.

12 Q. Never heard of the term a bedroom
13 collection or living room collection?

14 A. I have seen that in advertisements
15 shopping for furniture.

16 Q. And it refers to -- your
17 understanding has always been it's
18 referring to a group of furniture, a
19 collection of furniture?

20 A. For like a bedroom collection
21 would be a bed and a nightstand and a
22 dresser.

23 Q. Right, a group of items of
24 furniture, correct?

25 A. Yes.

1 MR. ROSE: That's all I have.

2 MR. SANDERS: No further questions
3 from me. Thank you very much for your
4 time.

5 THE WITNESS: You are welcome.
6 That was easy.

7 MR. ROSE: Thank you.

8 (Signature reserved.)

9 (Whereupon, at 10:53 a.m., the
10 taking of the instant deposition ceased.)
11
12
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25

1 E R R A T A S H E E T

2 RE: TERESA H. EARNHARDT V. KERRY
3 EARNHARDT, INC.

4 DEPOSITION OF: KELLEY EARNHARDT MILLER

5 Please read this original deposition
6 with care, and if you find any corrections
7 or changes you wish made, list them by
8 page number, line number and state reason
9 for change below. DO NOT WRITE IN THE
10 DEPOSITION ITSELF. Return the deposition
11 to this office after it is signed. We
12 would appreciate your prompt attention to
13 this matter.

14 To assist you in making any such
15 corrections, please use the form below.
16 If supplemental or additional pages are
17 necessary, please furnish same and attach
18 them to this errata sheet.

19 Page 7 Line 2 should

20 Read: not best but "least"

21 Reason for change _____

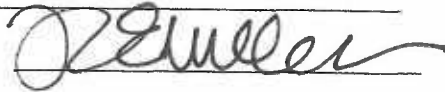
22 Page 7 Line 15 should

23 Read: Reads 18 but should read "It's"

24 Reason for change _____

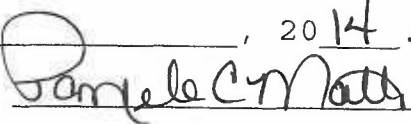
25

1 Page ____ Line ____ should
2 Read: _____
3 Reason for change _____
4 Page ____ Line ____ should
5 Read: _____
6 Reason for change _____
7 Page ____ Line ____ should
8 Read: _____
9 Reason for change _____
10 Page ____ Line ____ should
11 Read: _____
12 Reason for change _____
13 Page ____ Line ____ should
14 Read: _____
15 Reason for change _____



Signature of Witness

18 SUBSCRIBED and SWORN TO before me this
19 28 day of October, 2014.



NOTARY PUBLIC

22 My Commission expires: 10/05/2016

1 CERTIFICATE OF REPORTER

2 STATE OF NORTH CAROLINA}

3 COUNTY OF MECKLENBURG }

4 I, Andrea L. Nobrega, the officer
5 before whom the foregoing deposition was
6 taken, do hereby certify that the witness
7 whose testimony appears in the foregoing
8 deposition was duly sworn by me; that the
9 testimony of said witness was taken by me
10 to the best of my ability and thereafter
11 reduced to typewriting under my direction;
12 that I am neither counsel for, related to,
13 nor employed by any of the parties to the
14 action in which this deposition was taken,
15 and further that I am not a relative or
16 employee of any attorney or counsel
17 employed by the parties thereto, nor
18 financially or otherwise interested in the
19 outcome of the action.

Andrea L. Nobrega

20
21 ANDREA L. NOBREGA

22 Court Reporter and Notary

23 Public for North Carolina

24

25 My Commission expires: 11-25-16